IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 503 OF 2001

1. Shri Adam Mohmad Darwajkar

2. Shri Rashid Mohmad Darwajkar

3. Sabdar Mohamad Darwajkar

4. Hajrat Mohmad Darwajkar

5. Gulsanbi Bashir Khedekar

6. Jayunabi Rajak Jamadar

All residing at Village Ajra,
Taluka Ajra,
District: Kolhapur ..Appellants
(Appellant Nos.1 to 4 Original Plaintiffs and 5 & 6 Original Defendant Nos.6 & 7.)

versus

1. Appa Daud Darwajkar

2. Abbas Abdul Darwajkar

3. Ismal Abdul Darwajkar

4. Yusuf Abdul Darwajkar

5. Yunus Abdul Darwajkar

All residing at Ajra,
Taluka: Ajra,
District: Kolhapur. ..Respondents

Mrs. Varsha Palav for the Appellant

Mr.C.G.Gavnekar for the Respondent

Coram : S.R.Sathe, J.
Dated : 18th October, 2006

JUDGMENT.

1. Appellants, the original plaintiffs and defendant Nos.6 and 7 have preferred this appeal against the judgment and order passed by the Court of Additional District Judge, Ghadingaj in Regular Civil Appeal No.98 of 1997 whereby the appeal was allowed and the judgment and order passed by the learned trial Judge restraining the defendant from obstructing the plaintiffs possession of the suit land was set aside. For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under :

. The suit land described in detail in paragraph 1 of the plaint was originally owned by one Kelkar. According to plaintiff his father Mohammed Darwajkar, took the said land as a tenant and as per the provisions of the Bombay Tenancy and Agricultural Lands Act (hereafter referred to as BTAL Act) he became owner of the said land. Mohammed died in the year 1979 leaving behind sons

plaintiffs 1 to 4, original defendants 6 and 7 the daughters. The defendant No.1 and father of the defendants 2 to 5 were residing separately from Mohammed. The suit land was exclusively owned by Mohammed and defendant had no concern with the same. After the death of Mohammed, in the year 1992, the defendants 1 to 5 started claiming that they being co-owners of the land their names be entered in the record of rights. When enquiry in that behalf was held by the SDO, he held that though the land in question was purchased in the name of Mohammed, it was for and on behalf of the joint family consisting of Mohammed and his two brothers and as such it was necessary to enter their names. The SDO, therefore, remanded the matter for fresh enquiry. The plaintiffs preferred appeal against the said order. However, taking advantage of the fact that the SDO had observed that the land was held by Mohammed for and on behalf of joint family, the defendants started obstructing the plaintiffs possession of the suit land. The plaintiffs also alleged that even if it is assumed that defendants 1 to 5 are having some legal right in respect of the suit land, they were never in actual possession of the same since the year 1955 and as such their right has been

extinguished. Hence the plaintiffs filed the present suit for declaration that they are having occupancy right in the same and defendants 1 to 5 are not having occupancy right in respect of the suit land and also prayed for permanent injunction restraining defendants 1 to 5 from obstructing plaintiffs possession of the suit land.

3. The defendants 1 to 5 filed their written statement at Exhibit 16 and opposed the suit claim. They admitted their relationship with Mohammed. However, they contended that the suit land was initially acquired as tenant by their common ancestor namely Dawood Darwajkar, from Kelkar and after the death of Dawood Darwajkar, his three sons namely father of plaintiffs, Appa i.e. defendant No.1 and Abdul the father of defendants 2 to 6 became the tenants of the said land. However, Mohammed being eldest, his name was recorded in the record of rights of the suit land and the land was also purchased only in his name. They, however, contended that by virtue of the provisions of BTAL Act, they have acquired right and share in the said land. Not only that, but they are also having joint possession of the same. Hence on all these grounds

the defendants 1 to 5 prayed for dismissal of the suit.

4. The defendants 6 and 7 did not file any written statement.

5. On these pleadings the learned trial Judge judge framed issues at Exhibit 17. In order to prove their case the plaintiff No.1 Adam Mohammed Darwajkar examined himself at Exhibit 60 and witness Abdul Rashid at Exhibit 65. As against this the defendant No.1 examined himself at Exhibit 71 and witness Devgiri Bua at Exhibit 75. Both the parties produced certain documents. After considering the entire evidence, the learned trial Judge came to the conclusion that the plaintiffs have proved that they are the owners of the suit land and they are in exclusive possession of the same on the date of the suit. The learned trial Judge also held that the defendants are obstructing plaintiffs possession and as such decreed the suit in plaintiffs favour.

6. Being aggrieved by the said judgment and order the defendants 1 to 5 filed regular Civil Appeal No.90 of 1997. After considering the

arguments advanced by both the parties, the learned Additional District Judge came to the conclusion that from the pleadings of the parties and evidence on record it is very clear that the plaintiffs and defendants are co-owners and having joint possession of the suit land and as such plaintiffs are not entitled for the permanent injunction as prayed. He, therefore allowed the appeal and dismissed the plaintiffs suit.

7. The above mentioned order is challenged by the plaintiffs in the present second appeal. While admitting this appeal, this Court (Coram V.C.Daga, J.) has passed the following order

> "Admit on the following grounds of law.
>
> Whether the Civil Court was justified in deciding the question relating about tenancy rights of Appa and Abdul without making reference to the competent Court under BTAL Act?

8. In this appeal before me Mrs. Palve, learned Advocate for the appellant/original

plaintiffs as urged only two points. Firstly, she submitted that the learned Additional District Judge has wrongly held that the suit land was jointly owned by Mohammed and his brothers. According to her the learned Judge ought to have held that the land is purchased by Mohammed alone and as such Appa and Abdul, the brothers of Mohammed had no right in the same. Secondly, she canvassed before me that the first Appellate Court should not have infact considered the aspect as to whether the defendant No.1, Appa and Abdul had tenancy rights or not because the Civil Court had no jurisdiction to decide the said issue. She, therefore, submitted that the appeal be allowed and the decree passed by the First Appelate Court be set aside and the order of the trial Court be restored. As against this Shri Gavnekar, learned Advocate for the respondent supported the judgment and order passed by the First Appellate Court.

9. The relationship between the parties is not in dispute. Though plaintiffs have alleged that the suit land was initially taken on lease by Mohammed i.e. plaintiff’s father and the said land was not in their family at any time, we find that they were

infact aware of the fact that the suit land was initially taken by Dawood, father of Mohammed on lease from the original landlord of the said land. The defendants have produced at Exhibit 79 the extract of the mutation entry No.632 dated 12.12.1956 wherefrom it is clear that Dawood Kasim Dawajkar was infact a protected tenant of the suit land. He died on 19.7.1955 and thereafter his three sons namely Mohammed, the father of the present plaintiff, Appa i.e. Defendant No.1 and Abdul the father of defendant Nos.2 to 5 became the tenants and as such they being heirs, their names were recorded in the record of rights of the suit land by virtue of the said mutation and Mohammed was shown as the Manager of the said family. It is true that in Mohammedian law there is no concept of joint family as that of Hindu law. However, what is to be noted is that initially Dawood was the protected tenant of the suit land and after his death his three sons being heirs became the tenants. However, thereafter the name of Mohammed only was shown in the column of "**Kul" & "Khand"** i.e. cultivation column. But that does not mean that he alone was the tenant of the said land, particularly when we find that as per the provisions of Section 40 of the

BTAL Act, he alongwith his other brothers had become the tenants. As a result of this even if 32M Certificate is granted only in the name of Mohammed it would have to be construed that he was shown as owner, he being the eldest son.

10. It is an admitted fact that when plaintiffs tried to get their names entered and to show that the defendants are not having any right, title and interest in the suit property, RTS appeal was filed by the defendants and the Sub Divisional Officer also cancelled the entry which was only in the name of Mohammed. Not only that but Plaintiff No.1 has himself admitted that he challenged the said order before the Collector, but there also the matter was decided against him. So, from the material on record it is very clear that Dawood Darwajkar was the tenant and after his death his thee sons namely Mohammed, Appa and Abdul became the tenants and consequently the deemed purchasers of the land and thus they are infact the co-owners of the suit land. Naturally, the plaintiffs are not entitled to get declaration that they alone are having occupancy right and the defendants are not having such rights.

11. It was tried to be argued on behalf of the appellant that in this matter the question that arose for consideration was whether Mohammed alone was tenant or whether alongwith Mohammed, Appa and Abdul were also tenants and as per the provisions of Section70B and 85A of the BTAL Act when such issue has arisen, it was necessary to refer the said issue to the tenancy court or to the Mamlatdar. But in the instant case no such reference has been made and as such the learned Additional District Judge was not justified in deciding tenancy rights of the parties. It is true that the question whether the person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased the land from the landlord is required to be dealt with by the Mamlatdar and Civil Court has no jurisdiction to decide the said issue and as soon as such issue arises the Civil Court has to refer the said issue to the Mamlatdar. However, that does not mean that in each and every case as soon as one party alleges that he is a tenant and the other party denies the same and contends that first party is not a tenant or that alongwith him there are other tenants also, then the said issue must be referred to Mamlatdar. Ultimately, Civil

Court is not under obligation to frame and remand the issue to tenancy authorities mechanically merely the same being raised in the written statement or in the pleading of the plaint without judicial satisfaction of its necessity and justification. The court has to see whether such issue is involved in the matter or whether the material on record is sufficient to show that particular party or parties are tenants or deemed purchasers. If it is so then there is absolutely no need to refer the matter to tenancy authorities. In the instant case there is ample material on record which clearly indicates that Dawood was the original tenant and by virtue of Section 40 after the death of Dawood his sons became the tenants and accordingly mutation entry was also effected. Not only that, but even according to plaintiff the defendants contention in this behalf has been accepted by the tenancy authorities in other proceedings. When such is the position, the question before the Court was only to find out whether the contention of the defendants that plaintiff’s fathers name was entered for and on behalf of the brothers or not and whether they had infact acquired necessary rights. So, in other words, the issue was whether the suit land belongs

to Mohammed and his two brothers jointly as indicated in mutation entry No.632. It is pertinent to note that even in the plaint the plaintiff has stated that even if after evidence it is established that Dawood had taken such land as tenant from Kelkar, the original owner of the land, still Dawood expired in 1955 and after his death plaintiffs father Mohammed was cultivating the land as tenant and as such defendants are not having any right, title and interest in the same. This averment in the plaint in a way shows that plaintiff is in fact aware of the real position but he tried to conceal the same and made an attempt to show that the suit land was initialy taken by Mohammed. So, under such circumstances the question involved in the suit is whether the defendants are also the co-owners could properly be decided by the Civil Court and reference to tenancy court was unnecessary. So, Civil Court was justified in observing that Appa and Abdul had become the co-owners of the suit land without referring the matter to the tenancy authorities. In similar circumstances, in a case **Babaji Bhagwan Patkar vs. Govind Bhagwan Patkar, 1972 Mah. L.J. No.43** when suit for partition and separate possession of property alleged to be joint family

the defendants eldest brother was declared to be statutory purchaser under Tenancy Act- defendant denied that the land belonged to joint family and claimed exclusive ownership, it was observed that issue arising on such contention is not required to be referred to tenancy court. Hence, having regard to the peculiar facts and circumstances of this case and the position of law, I think that in the instant case, on the material available the Civil Court was competent to decide the issue involved or in other words the rights of Appa and Abdul. There is absolutely no such issue involved in the matter which could have been referred to and decided only by the Tenancy Court. Hence the order passed by the learned Additional District Judge is legal and correct.

. In this view of the matter, there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.Sathe, J.)